PUBLIC VERSION

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
THE LIBRARY OF CONGRESS
Washington, D.C.

In re	)	
DETERMINATION OF ROYALTY RATES AND TERMS FOR EPHEMERAL RECORDING AND DIGITAL PERFORMANCE OF SOUND RECORDINGS (*WEB IV*)	)	**Docket No. 14-CRB-0001-WR (2016-2020)**

PANDORA MEDIA, INC.'S

1. Written Rebuttal Testimony of Simon Fleming-Wood

2. Supplemental Written Rebuttal Testimony of Carl Shapiro

April 21, 2015

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
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In re	)	
DETERMINATION OF ROYALTY RATES AND TERMS FOR EPHEMERAL RECORDING AND DIGITAL PERFORMANCE OF SOUND RECORDINGS (*WEB IV*)	)	Docket No. 14-CRB-0001-WR

WRITTEN REBUTTAL TESTIMONY OF SIMON FLEMING-WOOD
(On behalf of Pandora Media, Inc.)

Introduction

1. My name is Simon Fleming-Wood. I am the Chief Marketing Officer of Pandora Media, Inc. ("Pandora"). I previously submitted Written Direct Testimony in the above-captioned proceeding on October 7, 2014.

2. I offer this rebuttal testimony in response to certain assertions made in Section III.E to the Corrected Written Rebuttal Testimony of Daniel Rubinfeld ("Rubinfeld CWRT"). I have reviewed the public version of Section III.E, in which Professor Rubinfeld describes four services—specifically, Rhapsody's unRadio, Spotify's Free Tier, Nokia's MixRadio, and Beats Music's "The Sentence"—as purportedly comparable to statutory licensees like Pandora. These four services, Professor Rubinfeld maintains, are "non-interactive and/or ad-supported services" similar in functionality to statutory licensees and whose royalty rates thus provide "additional market evidence" corroborating SoundExchange's rate proposal for the statutory license. *See* Rubinfeld CWRT at 42-48.

3. I disagree with Professor Rubinfeld's characterizations of these services. As detailed below, not only are these services clearly not compliant with the limits of the statutory license, they offer a range of features and functionality that extend well beyond what can be found either on Pandora or on any other statutory webcaster's service. Further, three of these services have not been nearly as successful as Pandora in generating a wide subscriber base, and we at Pandora do not view them as meaningful competition.

Rhapsody's unRadio

4. Rhapsody's unRadio service is a streaming service that allows users to listen to stations created by Rhapsody or to create their own stations based on a song or artist. Professor Rubinfeld claims that "[i]n terms of functionality, it is very similar to customizable services like Pandora." *See* Rubinfeld CWRT at 47. That is flatly incorrect. Among other features, Rhapsody unRadio allows users an unlimited number of skips (as Professor Rubinfeld concedes, *see id.*)—whereas Pandora's ad-supported service currently limits its users to up to 6 skips per hour or 24 total skips per day.[1] More than [redacted] of Pandora listeners reach their limit of skips in a given month and more than [redacted] listeners reach their skip limit [redacted]. Pandora's limit on skips [redacted]

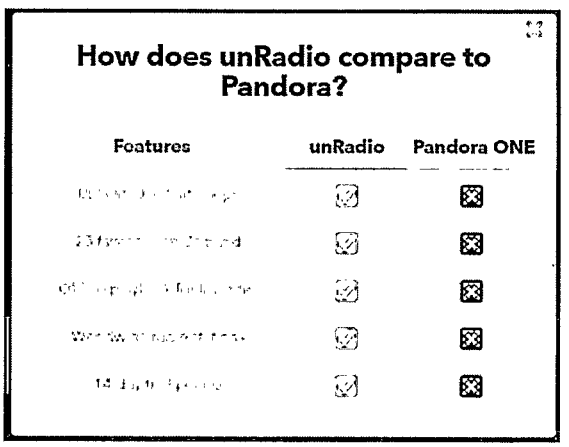
5. UnRadio users can also view a short list of upcoming tracks, and remove tracks they do not want to hear.[2] This provides a level of interactivity not offered by statutory

[1] *See* Help, PANDORA.COM, http://help.pandora.com/customer/portal/articles/24601-skip-limit (last visited on Apr. 15, 2015).

[2] Christopher Breen, *Rhapsody unRadio is no Pandora One killer but it's free (for some)*, TECH HIVE, Aug. 28, 2014, http://www.techhive.com/article/2599314/rhapsody-unradio-is-no-pandora-one-killer-but-its-free-for-some.html (last visited on Apr. 15, 2015).

webcasters like Pandora. UnRadio also allows a listener to cache a list of 25 "favorite" songs for subsequent on-demand listening—functionality well beyond what Pandora can offer statutorily.[3]

6. I am not the only one who disagrees that unRadio has similar functionality to Pandora; so does unRadio itself. Indeed, unRadio prominently markets itself based on how its functionality *differs* from Pandora. *See* Figure 1:[4]



7. As the final line of the above chart indicates, unRadio is only offered for free for a limited period of time to users. After the 14-day trial period, users must either subscribe or stop listening to the service. Coupled with the other functionality described above that are not provided by statutory webcasters like Pandora, the limited availability of unRadio as a free service further confirms that it is an unhelpful analog to Pandora, rather than "another confirmatory benchmark," as Professor Rubinfeld contends. *See* Rubinfeld CWRT at 47.

[3] *See* Joan E. Solsman, *Rhapsody's UnRadio with T-Mobile: How it measures up*, CNET.COM, June 18, 2014, http://www.cnet.com/news/rhapsody-unradio-with-t-mobile-how-it-measures-up/ (last visited on Apr. 20, 2015); Jeffrey L. Wilson, *Rhapsody unRadio (for Android)*, PC MAG, July 29, 2014, http://www.pcmag.com/article2/0,2817,2358596,00.asp (last visited on Apr. 15, 2015).

[4] *See also* RHAPSODY.COM, www.rhapsody.com/unradio (last visited Apr. 20, 2015).

Spotify's Free Service Tier

8. Spotify's primary service is on-demand, interactive streaming in two varieties: a paid subscription version, as well as a free, ad-supported, version. The free version allows for fully on-demand streaming on desktop computers, and somewhat more limited functionality on mobile devices. *See* Rubinfeld CWRT at 45-46. It is the latter, mobile portion of the free service that Professor Rubinfeld focuses on in his rebuttal testimony (the so-called "Shuffle" service), claiming that it constitutes 42% of listening on Spotify's free service. *Id.* at 46. What that leaves unstated is that 58% of the listening on Spotify's free service is done on the desktop version – *i.e.*, the full on-demand service. Professor Rubinfeld has artificially highlighted one portion of a much broader, on-demand service.

9. Regardless, Professor Rubinfeld's suggestion that Spotify's "Shuffle" functionality is somehow similar to Pandora or other statutory streamers is far from accurate. Spotify's Shuffle service provides users with far more control over the music that they stream than is available on Pandora. A Shuffle user can choose to hear music from a specific artist and Spotify will play songs *only* from that artist. Similarly, a Shuffle user can select a particular album, and hear songs *only* from that album.[5] By contrast, under its statutory license Pandora can play no more than 4 songs by the same artist or 3 songs from the same album *in any given three hour period.* Shuffle users can also create playlists by choosing whatever songs they want to listen to, so long as the playlist is at least twenty songs long and contains music from at least three different albums.[6] None of these functions – or anything close to them – is available on

[5] In the event the album has fewer than 12 songs, Spotify will add additional songs of similar style to the playlist. Help, SPOTIFY.COM, https://support.spotify.com/us/learn-more/guides/#!/article/spotify-free-on-your-mobile-phone (last visited Apr. 17, 2015).

[6] Christina Warren, *Spotify's Free Mobile Offering: Everything You Need to Know*, MASHABLE.COM, Dec. 11, 2013, http://mashable.com/2013/12/11/spotify-free-faq/ (last visited on Apr. 15, 2015).

Pandora's service.[7] They much more closely resemble Spotify's primary on-demand offering, with the exception that users cannot control the precise order in which they listen to songs they have selected. Indeed, when Spotify launched the Shuffle service, it specifically touted the control that its users would experience: "Want to listen to a certain artist? Just hit shuffle play, sit back and listen to their entire catalogue. Don't settle for something similar. *Don't settle for just one track from the artist you want to hear every 20 minutes.*"[8]

10. Additionally, as noted above, under the statutory license Pandora must adhere to the "Sound Recording Performance Complement" (*e.g.*, Pandora may only play four songs by the same featured artist within any three hour period). *See* 17 U.S.C. § 114(j)(13). Spotify's Shuffle feature, by contrast, clearly does not adhere to the Sound Recording Performance Complement, as it lets a listener stream entire albums as well as "any artist's *entire catalog* without a paid subscription."[9] Because Shuffle does not adhere to the Performance Complement, and allows its users to select what they hear (albeit by album or playlist), its service is not only not compliant with the limitations of the statutory license, but significantly differs from Pandora's "lean back" internet radio service.

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[7] "When selecting an artist, their entire catalog can be played for free using the shuffle play mode. That's different from Apple's iTunes Match and Pandora, two streaming services that allow users to search for an artist and then play songs by similar artists in a personalized Internet radio station." *See Spotify for iPhone, iPad Goes Subscription-Free, With Shuffle-Only Limitation*, APPLEINSIDER.COM, Dec. 11, 2013, http://appleinsider.com/articles/13/12/11/spotify-for-iphone-ipad-goes-subscription-free-with-shuffle-only-limitation (last visited on Apr. 15, 2015).

[8] Candice Katz, *Music for everyone. Now free on your mobile*, SPOTIFY.COM, Dec. 11, 2013, https://news.spotify.com/us/2013/12/11/music-for-everyone-now-free-on-your-mobile/ (last visited on Apr. 15, 2015) (emphasis added).

[9] Shane Cole, *Spotify rolls out subscription-free 'Shuffle play' mode for iOS,* APPLEINSIDER.COM, Jan. 8, 2014 http://appleinsider.com/articles/14/01/08/spotify-rolls-out-subscription-free-shuffle-play-mode-for-ios (last visited on Apr. 15, 2015) (emphasis added).

Nokia's MixRadio

11. MixRadio, a music service for Nokia phones, is a streaming service that offers both a paid and free tier, with the latter tier only available to users with certain Nokia devices. Unlike Pandora, MixRadio's free tier has no advertisements and is instead "tied to the sale of Nokia devices" (*i.e.*, it was an incentive Nokia wished to provide to users to encourage sales of its devices). *See* Rubinfeld CWRT at 47-48. Professor Rubinfeld states that MixRadio is "a non-interactive, customized streaming service comparable to Pandora and others operating under the statutory license." *Id.* at 48. Again, I disagree with Professor Rubinfeld's conclusion that MixRadio is either "non-interactive" or "comparable to Pandora." My understanding is that MixRadio allows its listeners to cache up to four "mixes" of music on their device for anytime offline access to "hundreds of tunes,"[10] a feature that clearly is not allowed under the statutory license.[11] By contrast, Pandora listeners (like terrestrial radio listeners) can only listen to music they hear "live" (*i.e.*, via streaming) while online and internet-connected; they do not have the option to save playlists they have already heard and "liked" for later listening. Moreover, MixRadio is such an insignificant player in the marketplace that Pandora does not even monitor its uptake.

Beats Music's "The Sentence"

12. Beats Music ("Beats") is primarily a subscription on-demand music service. It has also offered, as part of its larger offering, an ad-supported feature called "The Sentence,"

[10] MixRadio. MICROSOFT.COM, http://www.microsoft.com/en-us/mobile/apps/app/mixradio/ (last visited on Apr. 15, 2015).

[11] As Professor Rubinfeld notes, MixRadio may be "*near*-DMCA compliant," Rubinfeld CWRT at 47 (emphasis added), but it is not, in fact, DMCA compliant.

which permits users to stream music curated by Beats based on input by the user.[12] Professor Rubinfeld states that "the free version of 'The Sentence' provides directly comparable functionality to services that were utilizing the statutory webcasting license." *See* Rubinfeld CWRT at 42-43.

13. Contrary to Professor Rubinfeld's description, I do not believe that Beats' The Sentence provided "comparable functionality" to a statutory webcaster like Pandora. Beats offers The Sentence to users, at least initially, only as part of a limited-time trial to the broader Beats service, during which time users can enjoy on-demand streaming of albums and playlists, and even download songs (including from The Sentence) to listen to when the subscriber does not have internet access (so-called "offline listening").[13] Our research suggests that offline listening is a valuable feature for a portion of Pandora's listeners, such that Pandora would offer that functionality if it were available under the statutory license. Because offline listening is *not* allowed under the DMCA, however, Pandora does not offer this feature to its listeners.

14. After the trial period expires, and the on-demand features are no longer available, it appears that users are able to continue using The Sentence portion of the Beats service in some fashion (it is not entirely clear for how long); the goal, however, appears mainly to be to try to convert users to paid subscribers of the full Beats service, not to run a standalone streaming service. As Professor Rubinfeld notes, The Sentence feature was created to "encourage people to subscribe to the [full Beats] service." *See* Rubinfeld CWRT at 42. This is not comparable to Pandora.

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[12] The Sentence uses the user's location—at home, at work, at the beach—and the user's mood to create a custom playlist. *See* Ellis Hamburger, *Beats Music hands-on: Dr. Dre has a playlist for you*, THEVERGE.COM, Jan. 20, 2014, http://www.theverge.com/2014/1/20/5319322/beats-music-vs-spotify-dr-dre-streaming (last visited on Apr. 15, 2015).

[13] *See* Walt Mossberg, *Beats Music Streams With a Human Touch*, RE/CODE.NET, Jan. 24, 2014, http://recode.net/2014/01/21/beats-music-streams-with-a-human-touch/ (last visited on Apr. 15, 2015).

15. Professor Rubinfeld also notes that "at its launch, Beats was seen as a competitive threat to Pandora." *Id.* at 45. I disagree that Beats was ever a "competitive threat" to Pandora. As Pandora does with respect to the launch of any digital music service, Pandora monitored Beats' launch in January 2014. Since that time, though, Pandora has not invested the time or resources to study or monitor Beats; due to its relatively insignificant size (it was reported in the press to have had 111,000 users total as of March 2014),[14] Pandora does not view Beats as a "competitive threat." In fact, it has been widely reported that "Beats has struggled since its release to be a major player in the music streaming industry despite the fact that it offers a number of unique and interesting features," and that it will likely be retired as a separately branded service and re-launched by Apple in a different format.[15]

[14] *See* Todd Wasserman, *Report: Beats Music Had Only 111,000 Subscribers in March*, Mashable.com, May 13, 2014, http://mashable.com/2014/05/13/beats-march-subscribers/ (last visited on Apr. 17, 2015).

[15] *See* Christian de Looper, *Apple and Beats to Relaunch Beats Music to Rival Spotify*, TECHTIMES.COM, March 27, 2015, http://www.techtimes.com/articles/42561/20150327/apple-beats-relaunch-music-rival-spotify.htm (last visited on Apr. 15, 2015); *see also* Daniel Kreps, *Apple to Relaunch Beats Music Service with Trent Reznor*, ROLLING STONE, March 26, 2015, http://www.rollingstone.com/music/news/apple-beats-plan-paid-streaming-music-service-20150326 (last visited on Apr. 17, 2015).

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DECLARATION OF SIMON FLEMING-WOOD

I, Simon Fleming-Wood, declare under penalty of perjury that the statements contained in my Written Rebuttal Testimony in the above-captioned proceeding are true and correct to the best of my knowledge, information, and belief. Executed this 17th day of April 2015 in Oakland, California.

Simon Fleming-Wood

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SUPPLEMENTAL WRITTEN REBUTTAL TESTIMONY OF CARL SHAPIRO

(On behalf of Pandora Media, Inc.)

PAN EX. 5365

Table of Contents

1. Qualifications and Assignment

My name is Carl Shapiro. My qualifications are provided in my Written Direct Testimony submitted previously in this proceeding on behalf of Pandora.[1]

I have been asked by attorneys for Pandora to review and respond to the newly disclosed portions of the Corrected Written Rebuttal Testimony of Professor Daniel Rubinfeld ("Rubinfeld Rebuttal Testimony") submitted by SoundExchange, as well as Professor Rubinfeld's discussion of certain additional license agreements in Section III.E of his Rebuttal Testimony. In conjunction with this assignment, I reviewed a number of materials in addition to those identified in my Written Direct Testimony and in my Written Rebuttal Testimony. The newly reviewed materials are listed in Appendix A.

I have prepared this Supplemental Written Rebuttal Testimony ("SWRT") under severe time constraints, with important information available to me for only a very short period of time. I have made every effort to incorporate that information into my analysis without errors under these time constraints. My analysis of these new materials is ongoing.

2. The Apple-Majors Agreements

In the Rubinfeld Rebuttal Testimony, Professor Rubinfeld asserts that the agreement between Apple and Warner Music Inc. ("Warner") and the agreement between Apple and Sony Music Entertainment ("Sony") that grant Apple the rights to perform Warner and Sony repertory music on its iTunes Radio service can be used as benchmarks for approximating the rates at issue in this proceeding. Professor Rubinfeld, using largely the same methodology he uses to analyze his interactive services benchmark, goes on to calculate a statutory benchmark rate associated with Apple's agreement with Warner of [redacted][2] and a statutory benchmark rate associated with Apple's agreement with Sony of [redacted][3]

In this Supplemental Written Rebuttal Testimony I discuss the two agreements that Professor Rubinfeld relies on as well as the agreement between Apple and the third major record company - Universal Music Group ("Universal"). Collectively, I refer to these agreements as the "Apple-Majors Agreements." As I discuss in greater detail below, Professor Rubinfeld's use of the Apple agreements is fundamentally flawed for a number of reasons.

First, the Apple-Majors Agreements, like Professor Rubinfeld's interactive service benchmark, do not appear to reflect the forces of competition at work. There is simply no evidence of any competition *among labels* to have their works performed on the iTunes Radio service. Absent such competition, these agreements tell us little about the rates that would be negotiated between willing buyers and willing sellers in a workably competitive market.

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[1] Written Direct Testimony of Carl Shapiro, October 6, 2014 ("Shapiro Direct Testimony").

[2] Rubinfeld Rebuttal Testimony, Appendix 2, ¶ 30.

[3] Rubinfeld Rebuttal Testimony, Appendix 2, ¶ 42.

Second, the Apple-Major Agreements are but one part of a complex web of agreements between Apple and the major record labels. Apple has secured multiple licenses from the major labels for a series of interrelated products, including the iTunes store and Apple's Cloud Service, and it is not at all clear, with the information currently available to me, how the various agreements interrelate. By way of but one example, Sony and Apple [redacted] That Amendment states that [redacted] Were one to use these agreements as a benchmark, it would be necessary to consider, among other things, [redacted]. Professor Rubinfeld has utterly failed to do so, or to consider the relation between the webcasting agreements and other Apple agreements more generally.

Third, the terms of the Apple-Major Agreements were almost certainly elevated by the presence of the statutory license. Just as with the Merlin-Pandora agreement and the various direct agreements between iHeart Media and record labels (including Warner), the otherwise applicable statutory license served as a magnet, pulling negotiated rates towards it, as that is the rate that would have prevailed in the event of a negotiating impasse.[5] Thus, if anything, the rates that emerge from a complete analysis of the Apple-Major Agreements are above those that would emerge in the absence of the statutory license.

Finally, Professor Rubinfeld's calculations are riddled with methodological and computational errors that render his analysis meaningless. Most fundamentally, Professor Rubinfeld entirely ignores the expectations of the parties at the time they entered into the iTunes Radio agreements, and instead provides only an *ex post* analysis. This is particularly egregious given Professor Rubinfeld's candid acknowledgment that neither party expected the service to perform as poorly as it did.[6] Said differently, Professor Rubinfeld's *ex post* approach tells us nothing about the rates that willing buyers and willing sellers agreed to when they struck their bargain. Accordingly, his analysis is meaningless.

Recognizing the foregoing challenges with using the Apple-Majors Agreements as benchmarks, I have, using the information currently available to me and in the time allowed, approximated the

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[4] SNDEX0119035 ([redacted]).

[5] This of course assumes, as Professor Rubinfeld appears to have done, that iTunes Radio is a statutorily compliant service. If that is not the case, then Professor Rubinfeld's analysis is flawed in yet another respect – he has failed to make any adjustments to account for the value of the functionality that goes above and beyond that which is allowed under the statutory license (as he attempted to do with his "interactivity adjustment" in his direct-phase testimony).

[6] *See, e.g.*, Deposition of Daniel Rubinfeld, April 14, 2015, p. 715 ("Rubinfeld Deposition Testimony") [redacted].

rates to which Apple and the Majors intended to agree when they entered into the agreements covering the iTunes Radio service. For all of the reasons discussed above, these rates overstate the rates that would emerge in a workably competitive market free of the statutory license – and are offered not as a benchmark for the Judges (or a "fix" of Professor Rubinfeld's failed methodology) – but to demonstrate just how off-target Professor Rubinfeld is in his approach. Accordingly, were my estimates to be used as a benchmark in this proceeding, a further downward adjustment to my calculated rates would be necessary.

A. The Apple-Majors Deals Are Not Reliable Benchmarks

While the Apple-Majors Agreements are superficially appealing as benchmarks, since they involve Apple's iTunes Radio service and were reached with all three major record companies, upon closer inspection they cannot be used as reliable benchmarks for several reasons.

First and foremost, not unlike the interactive-service agreements relied on by Professor Rubinfeld in his Direct Testimony, the Apple-Majors Agreements do not appear to reflect the forces of competition at work.[7] Nothing in the record that I have seen indicates that there was any competition between labels to have their sound recordings performed on the iTunes Radio service. Along the same lines, there is no indication that Apple, during the negotiations with the majors, even raised the possibility that it could steer toward one record company or threatened to steer away from a record company, based on differences in royalty rates.[8]

Given the lack of competition between labels to secure increased performances on iTunes Radio, the incentive of a record label to offer a discounted rate below the otherwise applicable statutory rate would be limited. So far as I can determine, the record companies [redacted] – not to take share on the service from their label competitors. Listening on iTunes Radio generates incremental revenue for record companies in the manner I discussed in my Written Rebuttal Testimony when discussing statutory services in general: by adding to total listening hours and by displacing listening on terrestrial radio, which generates no royalties.[9] In addition to those rationales, which apply in general to statutory services, the record companies appear to have expected iTunes Radio to displace listening on Pandora.[10] That displacement generates incremental revenues for a record company as long as the incremental royalty rate paid by Apple to that record company exceeds the rate paid by Pandora to that record company. To be clear,

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[7] Corrected Testimony of Daniel L. Rubinfeld, October 6, 2014 ("Rubinfeld Direct Testimony").

[8] [redacted] Rubinfeld Deposition Testimony, p. 710.

[9] For example, [redacted] See SNDEX0186708 at 733 ([redacted] November 15, 2012).

[10] SNDEX0425604 at 604 (Universal, untitled, undated). [redacted] See also, SNDEX0185425 at 431 ([redacted] April 12, 2013), and SNDEX0310884 at 890 ([redacted] April 2013).

the desired displacement by the record labels of performances on Pandora for performances on iTunes Radio is not a form of competition, let alone one that is relevant in this proceeding. For rates to approximate those that would emerge in a workably competitive market, there must be competition between record labels to have their works performed on a particular service.

As a result of the lack of competition at work, the Apple-Majors Agreements are poor benchmarks. Were these agreements to be used as a benchmark to set the rates at issue in this proceeding, a downward adjustment would be necessary to account for this lack of competition.

Second, the Apple-Major Agreements constitute just one part of a complex and interconnected set of agreements between Apple and the major record companies (and their publishing counterparts) that involve important non-statutory services, including the Apple Cloud Service and the iTunes music store. For example,

- Sony:
- Universal:
- Warner:

As the above examples make plain, the negotiations related to the Cloud Service and the iTunes Radio service were clearly intertwined. Given the incomplete and complex evidentiary record, it is impossible to ascertain with certainty how to appropriately treat the significant payments that are included in the iTunes Radio Agreements yet clearly relate to the Cloud Service. Such an undertaking is necessary if one were to use the Apple-Majors Agreements as benchmarks. Professor Rubinfeld has failed completely to undertake such an analysis, choosing instead to

[11] SNDEX0119035 ( ). This amendment is attached hereto as Pandora Exhibit 21.

[12] SNDEX0119102. This amendment is attached hereto as Pandora Exhibit 22.

[13] SNDEX0119099 ( ). This amendment is attached hereto as Pandora Exhibit 23.

simply plug the Radio Agreement payments into the model he developed for the interactive services in his written direct testimony.

Along the same lines, Apple's own business interests in the iTunes Radio product are unique as a result of the far greater revenues that Apple earns from related products and services associated with iTunes, including, primarily, music downloads. These related businesses make it impossible to isolate the rates willing buyers and willing sellers would agree to solely for the iTunes Radio service and very likely increased Apple's willingness to pay for the rights to stream recorded music on the iTunes Radio service. Once again, were one to use the Apple-Majors Agreements as benchmarks, one would have to account for the impact that other revenue streams had on the parties' willingness to pay and accept.[14] Professor Rubinfeld has failed to give any consideration to these complexities.

B. The Apple-Major Agreements Rates Were Artificially Inflated by the Presence of the Statutory Rates

Despite Professor Rubinfeld's claims to the contrary, the existence of the statutory rate clearly impacted the negotiating positions of all parties to the Apple-Major Agreements.[15] The evidence clearly indicates that the major record companies and Apple were well aware of the existing statutory rates as well as the likelihood that any negotiated agreements would be used in the current proceeding, notwithstanding the "no-precedent" language inserted in the agreements.

- Sony: Sony considered that [redacted]
- Warner: An internal Warner document, although partially redacted, clearly reflects [redacted] Mr. Wilcox testified that [redacted]

[14] I understand that the Judges have not permitted discovery as to these other license relationships between Apple and the majors.

[15] Professor Rubinfeld, in an effort to get around the blatant inconsistency of proposing a benchmark that was clearly negotiated in the shadow of the statutory license while at the same time criticizing the Pandora-Merlin and iHeart-Warner Agreements for suffering from the same asserted flaw, claims that the Apple-Major Agreements are different because, in his view, they were not expected to be used in front of the Copyright Royalty Board. Apart from the limited economic relevance of such a fact, even if true, as demonstrated here, this was simply not the case.

[16] SNDEX0210940, at 946 (Sony, "[redacted]," undated).

[17] SNDEX0210940 at 944 (Sony, "[redacted]," undated). The Apple proposal discussed in this document was for [redacted]

[18] SNDEX0186599 at 606 ("[redacted]", September 10, 2012).

[redacted][19]

Warner considered that [redacted]

- Universal: Universal was concerned that [redacted]

  Universal observed: "[redacted]

  [redacted][20] Universal was also concerned that [redacted]

  Universal also said that [redacted]

- Apple: Apple expressed to Sony a willingness to help establish a high statutory rate. In October 2012, Eddy Cue, negotiating on behalf of Apple, [redacted]."

As I discuss at length in my Written Rebuttal Testimony, the existence of the statutory rate can have a distorting impact on negotiated rates, elevating rates above the levels that would otherwise prevail in the absence of that statutory license.[25] Put differently, the statutory rate

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[19] Deposition of Ronald C. Wilcox, April 2, 2015, p. 311.

[20] SNDEX0185572, at 575 (Warner, "[redacted]," April 4, 2013).

[21] SNDEX0252015 at 017 ("[redacted]"). "[redacted] See also, SNDEX0426050, at 056 (Universal, "[redacted]" December 6, 2012) and SNDEX0264910, at 910 ([redacted]" January 22, 2013):

[redacted]

[22] SNDEX0426050, at 056 (Universal, "[redacted]," December 6, 2012).

[23] SNDEX0252015, at 018 (Universal, "[redacted] March 6, 2013). When discussing [redacted]. See, SNDEX0252015, at 015.

[24] SNDEX0252015 at 016 ("[redacted]").

[25] Shapiro Rebuttal Testimony, pp. 32-34.

serves as a magnet – pulling negotiated rates up towards it.[26] To appropriately analyze the Apple-Major Agreements, one must account for the upward bias created by the presence of the statutory license on negotiated rates. Professor Rubinfeld has failed to do so.

C. Professor Rubinfeld Committed Two Major Methodological Errors

The methodology used by Professor Rubinfeld to evaluate the Apple agreements with Sony and with Warner suffers from two fundamental and fatal flaws: (1) his analysis is blatantly inconsistent with the fact that the statutory rate establishes – by his own admission – a ceiling for statutory services; and (2) he fails to consider or incorporate evidence regarding the parties' valuations of these licenses contemporaneous with their execution, and instead relies on a measure that – by his own admission – departs markedly from the price that this willing buyer (Apple) and these willing sellers (Warner and Sony) considered reasonable when they entered into these agreements.

Due to these flaws, the "Adjusted Effective Per Play Rates" calculated by Professor Rubinfeld provide no reliable information for the purpose of setting the statutory rates for 2016-2020.

1. The Statutory Rate Establishes a Ceiling for Statutory Services

The statutory rate places a ceiling on the rate that any statutory service will pay. This basic proposition is undisputed in this proceeding. Professor Rubinfeld recognizes in his Written Direct Testimony that the statutory rate serves as a ceiling for what a statutory service will pay,[27] and the entire approach taken by Professor Talley in his bargaining model is predicated on this same basic fact.[28] Professor Talley is clear on this point: "at the very least, the presence of the statutory license places a ceiling on the set of plausible negotiated prices that would ever conceivably emerge from negotiated transactions from a willing buyer and willing seller."[29]

The Web III per-play rate was set at $0.0021 for 2013, $0.0023 for 2014 and $0.0023 for 2015. Professor Rubinfeld states that the "[redacted]"[30] These Web III rates then, by Professor Rubinfeld's own admission, should have

[26] See, for example, SNDEX0185553, at 554 (WMG, "[redacted]," April 4, 2013). (WMG observed internally that the "[redacted])

[27] Rubinfeld Direct Testimony, ¶ 98 and footnote 76. See also Rubinfeld Rebuttal Testimony at ¶ 222, stating that the statutory rate served as "the ceiling of negotiations." Professor Rubinfeld also repeatedly refers to the fact that statutory services have the option of electing the statutory license. See, for example Rubinfeld Rebuttal Testimony at ¶ 61, stating that "iHeartMedia had the option of electing the statutory rate," and Rubinfeld Rebuttal Testimony at ¶ 64, stating that "Pandora had the option to elect the below-market pureplay rates." For a discussion by SoundExchange's Record Company witnesses of their awareness that the rates payable under the statutory license act as a constraint on the rates they are able to negotiate in directly licensed agreement, see SoundExchange, "Responses and Objections to the First Set of Interrogatories from the Licensee Participants," November 8, 2014. See also Written Direct Testimony of Aaron Harrison, October 6, 2014, ¶ 20, and Written Direct Testimony of Ron Wilcox, October 6, 2014, p. 5.

[28] Written Rebuttal Testimony of Eric L. Talley, February 22, 2015, pp. 33-58.

[29] Written Rebuttal Testimony of Eric L. Talley, February 22, 2015, p. 47.

[30] Rubinfeld Rebuttal Testimony, Appendix 2, at SX EX. 059-1-RR.

placed a ceiling on what Apple would agree to pay in royalties for the iTunes Radio service during those three years. Nonetheless, Professor Rubinfeld asserts that Apple agreed to pay Warner at least [redacted] per play, after he makes certain adjustments to derive a rate applicable to statutory licensees. In short, *Professor Rubinfeld is testifying that Apple agreed to pay Warner roughly* [redacted] *more than the statutory rate it otherwise could have paid.*

Likewise, Professor Rubinfeld asserts that Apple agreed to pay Sony at least [redacted] per play, after he makes certain adjustments to derive a rate applicable to statutory licensees. For Sony, *Professor Rubinfeld is testifying that Apple agreed to pay Sony roughly* [redacted] *more than the statutory rate it otherwise could have paid.*

Professor Rubinfeld has not been able to offer any sensible explanation for calculating rates that clearly are well above what any party contemplated, other than simply stating that he is comfortable with his approach. Clearly, Professor Rubinfeld has made a very serious error of some type. I can find nothing in the Rubinfeld Rebuttal Testimony indicating that he is even aware of the stunning contradiction between the rates he calculates and the undisputed fact that the statutory rates serve as a ceiling on the rates that any statutory service would pay.[31] When asked about this at his deposition he offered no plausible economic explanation, but nonetheless defended his analysis even as he acknowledged that "[redacted]"

In my opinion, this contradiction alone implies that the benchmark rates calculated by Professor Rubinfeld based on the Apple agreements with Warner and with Sony are unreliable and should be dismissed out of hand. However, to clarify the record and provide additional information that may prove useful for the Judges, I will attempt to identify some additional particular errors made by Professor Rubinfeld.

2. The Proposed Benchmark Derives Rates from Actual, Not Expected, Numbers of Plays

The second major flaw in Professor Rubinfeld's methodology is his use of an *ex post*, rather than *ex ante*, approach to evaluating the Apple-Sony and Apple-Warner Agreements. Rather than examine the expectations of the parties at the time they entered into the agreement, Professor Rubinfeld focuses solely on what actually happened after the agreements were signed. This is a very serious methodological error.

This flaw is most clearly highlighted in Professor Rubinfeld's analysis of the [redacted] called for in the Apple-Warner Agreement, and the [redacted] called for in the Apple-Sony Agreement. If one assumes that [redacted] statutory performances made on the iTunes Radio service, converting

[31] Professor Rubinfeld made the same mistake in his Direct Testimony regarding the agreement between iHeartMedia and Warner.

[32] Rubinfeld Deposition Testimony, p. 715.

[33] Below, I explain that some or all of [redacted].

these into effective per-play rates requires an estimate of the number of plays [redacted].

Professor Rubinfeld calculates his "Adjusted Effective Per Play Rates" using data on the actual number of compensable plays of Warner and Sony music on iTunes Radio under the Major-Apple Agreements.[34] In other words, he takes an *ex post* approach. Professor Rubinfeld provides no explanation in Appendix 2 to his Rebuttal Testimony for his decision to use an *ex post* approach rather than an *ex ante* approach based on the number of plays that was expected when these agreements were signed.[35] Since the actual number of performances made on the iTunes Radio service [redacted] Professor Rubinfeld's *ex post* approach yields dramatically higher per-play rates that does an *ex ante* approach.

Despite the magnitude of this difference, Professor Rubinfeld continues to maintain that his much higher rate, although not a rate [redacted], is an appropriate benchmark for the purpose of establishing the statutory rate.[36] This approach makes no sense, conceptually or methodologically, under a standard that seeks to establish a rate that a willing buyer would agree to pay a willing seller, and substantially inflates the per-play rates that Professor Rubinfeld calculates.

In some situations, for the purpose of calculating the effective price per unit under a contract, it will make little difference whether one uses the actual number of units purchased or the expected number of units at the time the contract was signed. For example, consider a very simple contract that specifies a certain price per unit, regardless of how many units the customer purchases. In that very simple case, the effective price per unit will be entirely unaffected by the customer's actual level of purchases, so the *ex ante* and *ex post* approaches coincide. However, if the contract contains a fixed, non-refundable, non-recoupable payment, the effective price per unit will be lower, the more the customer purchases. This will cause the *ex ante* and *ex post* approaches to diverge. The difference between the two approaches will be large if (a) the lump-sum payment is large, and (b) the actual number of performances differs significantly from the expected number of performances. [redacted] Professor Rubinfeld acknowledged as much in his deposition. In such a situation, to best understand the per-play price to which the willing buyer and willing seller were agreeing, it is far more appropriate to look at the number of performances they expected to be covered by the lump sum at the time they struck their bargain.

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[34] Rubinfeld Rebuttal Testimony, Appendix 2b (Warner) and Appendix 2c (Sony), using data on plays from September 2013 through October 2014. As discussed below, the play count used by Professor Rubinfeld is the [redacted] that would be counted as performances under the statutory license.

[35] Compounding this error, when Professor Rubinfeld calculates the *ex post* per-play rate, he [redacted]. This approach is equivalent to assuming that iTunes Radio will have the same average number of performances in the last month under the agreement as it had in the first month. [redacted].

[36] *See* note 6 *supra*. Rubinfeld Deposition Testimony, pp. 652-656.

[37] Rubinfeld Deposition Testimony, p. 715.

A simple example will illustrate why Professor Rubinfeld's approach is faulty. Suppose a service agrees to pay a $1 million to a record company for the right to play as much music from that record company as it wants for a one-year period. Suppose that both the record company and the music service project that the service will perform the record company's music 1 billion times over the one-year period. This corresponds to a projected per-play rate of $0.0010.

Suppose that the service turns out to be far less successful than both parties expected over the relevant one-year period and only performs this record company's music 50% as much as expected, i.e., 500 million times. The service's disappointing growth over the year in question does not alter the fact that the parties entered into a deal expecting the per-play rate to be $0.0010. Nonetheless, Professor Rubinfeld's approach would divide the $1 million up-front payment in my hypothetical by 500 million performances rather than the expected 1 billion and yield a per-play rate of twice as much, namely $0.0020. To say that the parties willingly agreed to an effective per-play rate of $0.0020 would be a major economic error. In this example, adopting Professor Rubinfeld's approach would mean setting the statutory rate at $0.0020 per play, twice as high as the rate agreed to by the buyer and the seller.[38] Likewise, if the service were far *more* successful than expected and played the music from this record company 2 billion times, the *ex post* realized rate would be $0.0005 per play. Applying Professor Rubinfeld's methodology to this hypothetical would mean setting the statutory rate at $0.0005 per play, half the rate agreed to by the buyer and seller. Although that result would be preferable for statutory services seeking to use the agreement as a benchmark, it would be just a much of an error as saying the statutory rate should be $0.0020 (twice what the willing buyer and seller agreed to).

Returning to the Apple agreements with Warner and with Sony, according to Professor Rubinfeld, [redacted]. These figures *alone* are [redacted]. Clearly, something is terribly wrong with Professor Rubinfeld's approach.

One striking indication of just how badly Professor Rubinfeld has gone astray by adopting an *ex post* approach can be found in his own Appendix 2b and Appendix 2c. According to Professor Rubinfeld's analysis, Apple has been paying Warner an "effective share" of [redacted] from iTunes Radio, and that Apple has been paying Sony an "effective share" of [redacted] from iTunes Radio.[40] Due to an additional error ([redacted]), Professor Rubinfeld reports that figure as [redacted] rather than [redacted]. After reporting that [redacted] figure, rather than recognizing that something is wildly wrong with his methodology, Professor Rubinfeld simply falls back on the

[38] More extreme errors can easily arise. In my example, if the service only reaches 20% of the size that was expected due to technical problems at the service or unexpectedly strong competition from another service, Professor Rubinfeld would calculate an effective rate *five times as high* as the actual rate to which the parties agreed. [redacted] See Rubinfeld Deposition Testimony, p. 865.

[39] Rubinfeld Rebuttal Testimony, Appendix 2b, line M (Warner) and Appendix 2c, line M (Sony).

[40] These figures are not reported in Professor Rubinfeld's Appendix 2b or 2c, but they can be calculated as the sum of [redacted].

55% of revenue prong in the statutory rate proposal found in his Written Direct Testimony.[41] The correct conclusion is quite different: Professor Rubinfeld's use of the fundamentally flawed *ex post* methodology has led him to make dramatic errors.

So far as I can determine, Professor Rubinfeld simply ignored how the parties themselves valued the licenses at the time they signed them, and gave no weight to contemporaneous evidence regarding how the parties to these agreements valued the proposed and final terms of their agreements, based on their projections about iTunes Radio performances and advertising revenues. Instead, Professor Rubinfeld's calculations are based entirely on the iTunes Radio post-agreement royalty reports. Those royalty reports reflect [redacted] when the webcasting agreements between Apple and Warner, and between Apple and Sony, were reached.[42]

In summary, Professor Rubinfeld's *ex post* methodology is entirely unreliable: it fails to reflect a price that the buyer (Apple) was willing to pay when it signed these two agreements or the price that the sellers (Warner and Sony) expected to receive when they signed the deals.

D. Professor Rubinfeld's Analysis is Further Compromised by a Large Computational Error

Moreover, even accepting Professor Rubinfeld's flawed *ex post* approach, his analysis contains a large additional computational error. This occurs when Professor Rubinfeld attempts to convert the effective per-play rates that he calculates for iTunes Radio into per-play rates for a statutory service. This calculation is necessary because his calculated Apple royalty rates apply solely to plays compensable under the Apple agreements, [redacted]

To calculate the effective per-play rate for *statutory* plays implied by the Apple agreements, Professor Rubinfeld should have used an adjustment ratio comparing the total number of plays on iTunes Radio (i.e., all those that would be compensable under the statutory license) to the number of compensable plays under the agreements (the plays that lead to his calculated effective rate). Such a calculation is not difficult, using detailed royalty reports that Apple provided to the Majors for May through November 2014.[44] The data from these reports show that the ratio of total plays to compensable plays was [redacted]. Taking Apple's royalty data for Warner as an example, these numbers reflect the fact that in addition to

[41] Rubinfeld Rebuttal Testimony, Appendix 2, ¶ 27.

[42] This can be seen, for example, by comparing actual performances in royalty reports to projections of performances made by Sony and by Apple. See also, SNDEX0126367 at 379 (Warner, "[redacted]" November 3, 2014) and SNDEX0195976 at 981 (Warner, "[redacted]" March 26, 2014).

[43] Match plays are performances of sound recordings identified by Apple as being in a listener's personal music collection.

[44] I have an additional royalty report for Sony, for December, 2014, and I was unable to locate royalty reports for Warner for August and December, 2014.

the approximately [redacted] *compensable* plays per listener-hour on iTunes Radio,[45] Apple also had approximately [redacted] Thus, the ratio of total plays to compensable plays is [redacted]. This ratio is not surprising given that Apple negotiated [redacted]

Inexplicably, Professor Rubinfeld chose not to use data available from Apple's royalty reports, but instead created an adjustment ratio using the much lower number of plays per listener-hour *on Pandora* of [redacted].[47] This resulted in an adjustment ratio of [redacted] – far below the actual ratios of about [redacted] for iTunes Radio that I report above. Using a ratio based on plays from Pandora data rather than a ratio based on actual data for iTunes Radio has the effect of ignoring [redacted] that would need to be paid for under the statutory license. Indeed, Professor Rubinfeld's ratio assumes that the number of [redacted] per listener per hour – an assumption that is blatantly contradicted by the very royalty reports used by Professor Rubinfeld. This error compounded the conceptual and methodological errors noted above, leading Professor Rubinfeld to *further* inflate his calculated benchmark per-play rates by 66% for Warner and 65% for Sony.

E. Contemporaneous Valuation of the Apple-Majors Agreements Reveals the Unreliability of Professor Rubinfeld's Analysis

I now identify the "Adjusted Effective Per Play Rates" that the parties attributed to the Apple-Majors Agreements when they were signed.

One aspect of this analysis bears special mention. As noted above, all three of the Majors [redacted]. In addition, the iTunes Radio generic contract with independent labels, and the iTunes Radio contract with the Beggars Group [redacted]. As Professor Rubinfeld has noted, the independent labels generally receive about the same royalty rates as do the Majors. That normal pattern suggests

[45] Professor Rubinfeld calculated [redacted] in Apple's royalty reports for Warner for September 2013 through November 2014. The difference between this number and the [redacted] figure that I report above is due to the different time period covered by the detailed royalty reports, May through November 2014. It does not impact the point made in the text that Professor Rubinfeld has failed to use the correct data source to calculate his adjustment ratio.

[46] The performance of [redacted]

[47] Rubinfeld Rebuttal Testimony, Appendix 2, footnotes 22 and 31, and Rubinfeld Direct Testimony, Exhibit 15b.

that a significant portion, if not all, [redacted] to iTunes Radio.

Nevertheless, since I am uncertain about [redacted], in what follows I calculate the statutorily effective rate paid by Apple to the Majors (to the extent the evidence permits me to do so) [redacted].

1. Apple

Apple prepared its best estimate of the potential financial impact of the iTunes Radio service [redacted][48] This document reports that Apple expected to perform an average of [redacted][49]

The analysis does not identify [redacted] Apple predicted its users to make, although the agreements allowed Apple [redacted]. The analysis also does not identify [redacted].

Based on the terms in its licensing agreements with the Majors and independent labels, Apple calculated that it would pay [redacted] This figure, however, [redacted] This calculation by Apple relied on [redacted]

In order to infer what Apple was projecting as to effective per-play rates compensable under the statutory license, one must adjust the figures above to account for [redacted] I have therefore converted Apple's [redacted] figures to effective statutory per-play rates using [redacted] The resulting adjusted effective per-play rates are [redacted] in the first year and [redacted] in the second year.

The foregoing numbers include [redacted] with Apple's projected royalty payments. If I exclude [redacted], I calculate adjusted effective per-play rates of [redacted] in the first year and [redacted] in the second year.

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[48] APL-CRB-000001 ([redacted]), attached hereto as Pandora Exhibit 24 and Deposition Testimony of Robert Wheeler. April 17, 2015, pp. 38-43 (Wheeler Deposition Testimony).

[49] Pandora Exhibit 24, at 010.

[50] Pandora Exhibit 24, at 012 to 013.

[51] Apple is allowed [redacted].

[52] Pandora Exhibit 24, at 012 to 013.

2. Universal

Universal also [redacted].

Universal included in its summary of results an estimate of the adjusted effective per-play rate when [redacted] is taken into account. This calculation implied an adjusted effective per-play rate associated with [redacted].

With [redacted], Universal calculated adjusted effective per-play rates under the iTunes Radio agreement of [redacted].[55]

3. Warner

I have not been able to identify any detailed model used by Warner to evaluate the terms of its agreement with Apple. Nevertheless, presentation documents from April 2013, before terms were finalized, show [redacted] Warner calculated an effective per-play rate of [redacted] Then, based on [redacted] For Year 2, Warner calculated an effective

[53] SNDEX0365483.xlsx (Universal Excel workbook).

[54] SNDEX0365483.xls (Universal Excel workbook). [redacted].

[55] In its modeling, Universal [redacted].

[56] SNDEX0185425 ([redacted] April 12, 2013) is the most recent document prior to finalization of the agreement in which I identified an evaluation by Warner of the iTunes Radio terms. The terms analyzed in this document [redacted] that Warner did not include in its effective rate calculations. These modest per-play and advertising revenue share increases do not have a significant impact on the calculate per-play rates.

[57] SNDEX0185425 at 430 ([redacted] April 12, 2013). Further discussion in these documents [redacted].

per-play rate of [redacted].

From the limited documentation I could find for Warner's calculations, I am unable to determine with confidence whether Warner intended that [redacted].

Notably, during the time period when Warner negotiated its agreement with Apple, and for months after the agreement was signed, Warner consistently [redacted].

4. Sony

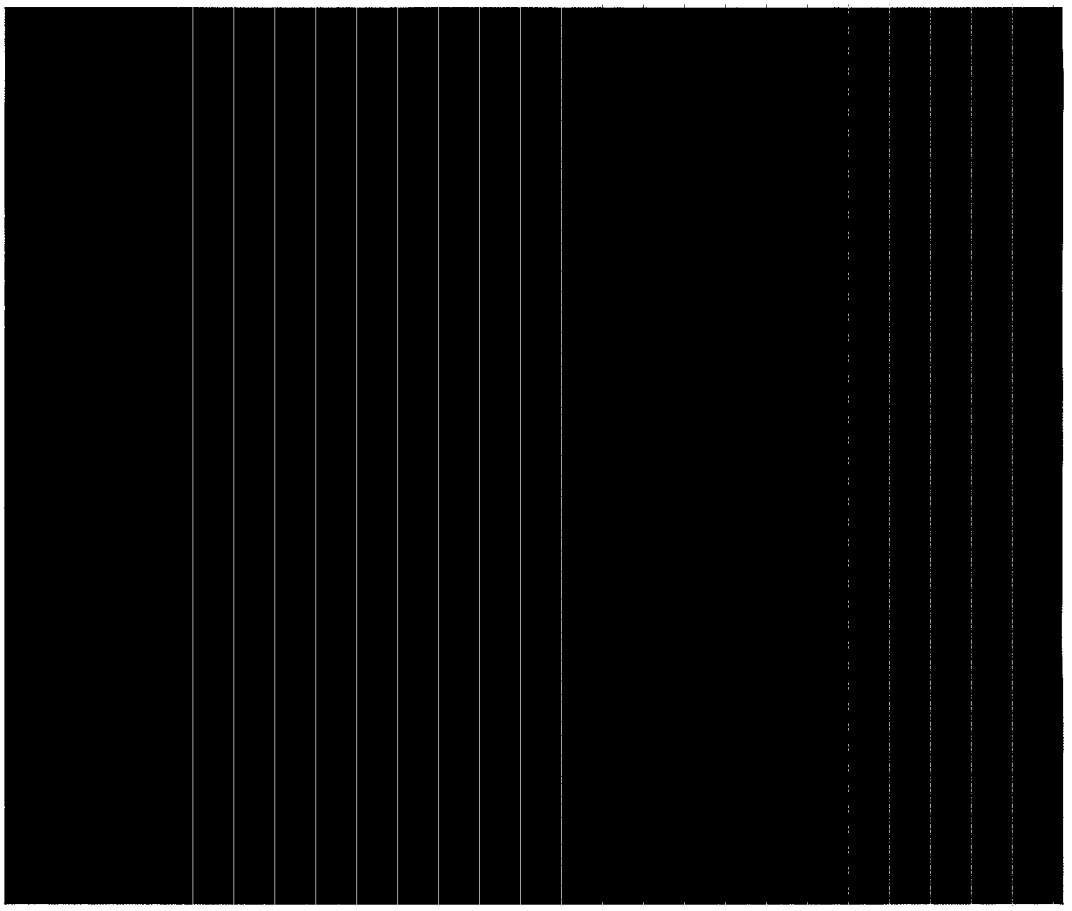
Sony constructed a model in which it [redacted]. Using this [redacted]. For the first year of the agreement, Sony estimated that [redacted]. For the second year of the agreement, Sony estimated that [redacted].

5. Summary of Expected Statutory Per-Play Rates

Table 1 below summarizes the adjusted effective per-play rates consistent with the deal modeling of Sony, Universal, and Apple. I have included the most recent *ex ante* effective per-play rates that I was able to identify in Warner documents. As I note above, I cannot with confidence infer whether [redacted].

[58] SNDEX0186352 at 352 (Internal Warner email from Wynne Dillon to Ron Wilcox, March 26, 2014).

[59] SNDEX0214511.xlsx, at tab "Actuals vs. Forecast." See discussion of Sony's modeling, for example, in SNDEX0213479 at 487, (internal Sony emails [redacted]).



In Table 1 above I have also included the midpoint between the rates anticipated by Apple and those anticipated by the label. While, for the reasons discussed at length above, it is not my view that the Apple-Majors Agreements are suitable benchmarks for use in this proceeding, these midpoints do provide some information about the expectations of the buyers and sellers who were parties to the Apple-Major Agreements – and show how dramatically overstated are the rates identified by Professor Rubinfeld.

3. Other New Evidence Put Forward by Professor Rubinfeld

Professor Rubinfeld has put forward as "corroborative" of his benchmark proposal certain royalty rates that have been negotiated for services that he claims are comparable or similar to statutory services. However, each of these examples is flawed in at least one of two ways. In all cases, the product Professor Rubinfeld relies on for corroborating evidence is a relatively minor product within a much more economically important product offering by the service. In addition, Professor Rubinfeld simply ignores the significantly enhanced functionality offered in the products he considers – functionality that renders the services non-DMCA compliant.[60] Royalties paid for these services cannot inform royalties that would be negotiated for a statutory service without an adjustment that reflects the incremental value of the greater functionality.

[60] These differences in functionality are discussed in greater detail in the Written Rebuttal Testimony of Simon Fleming-Wood.

Professor Rubinfeld makes no such adjustment, even where he conceded he "reasonably" could have done so.[61] He instead simply "chose not to."[62]

A. Beats "The Sentence"

In paragraphs 179-189 of the Rubinfeld Rebuttal Testimony, Professor Rubinfeld asserts that Beats' service, "The Sentence," provides "very strong corroborative evidence of the reasonableness" of his fee proposal. However, Professor Rubinfeld has overlooked at least one major and obvious problem with using the rates he cites here as benchmarks.

The free version of The Sentence used by Professor Rubinfeld for benchmarking purposes has been a very minor product offering by Beats, and the rate cited by Professor Rubinfeld [redacted]. During the time period covered by Professor Rubinfeld's data for The Sentence, February through October 2014,[63] royalty payments to the Majors for Beats' "Limited" service, which I understand is The Sentence,[64] were [redacted]. In addition to the presence of extra-statutory features that Professor Rubinfeld failed to adjust for, these factors make it impossible to extract a reliable and meaningful rate for The Sentence alone from the Beats agreements cited by Professor Rubinfeld.

B. Spotify Free Tier

In paragraphs 191 to 195 of his Rebuttal Testimony, Professor Rubinfeld claims that royalty rates Spotify pays for performances on its advertising-supported service are corroborative evidence for his proposed benchmark rates. Professor Rubinfeld focuses on Spotify's "Shuffle" service, which is available on mobile phones. Professor Rubinfeld cites a per-play figure of [redacted] that he takes from the Spotify agreements with Universal, Sony, Warner, and Merlin.[65] In fact, all performances to users of Spotify's free service [redacted], whether the performance is via the Shuffle service or it is a fully on-demand performance via a desktop computer.[66] Professor Rubinfeld has taken as corroborative evidence what is basically a [redacted] and applied that rate fully to performances with the least functionality. This does not make economic sense.

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[61] Rubinfeld Deposition Testimony p. 776.

[62] *Id.*

[63] Beats data for January 2014 are excluded because The Sentence first appears in Professor Rubinfeld's data in February 2014. Data for November 2014 are excluded because they are incomplete.

[64] I understand the "Limited" service to refer to The Sentence, based on it being the only service with a royalty structure matching that which Professor Rubinfeld describes (other than a Southwest Airlines Beats product introduced in November 2014).

[65] Rubinfeld Rebuttal Testimony, ¶ 193.

[66] Fifty-eight percent of listening to the Spotify free service is via desktops where the experience is fully interactive. Rubinfeld Deposition Testimony, pp. 774-775 and 790.

Moreover, even performances on the Shuffle service offer some functionality that is not DMCA-compliant (such as listening to single albums, single-artist streams, and personal playlists). Professor Rubinfeld appears to recognize this. Yet he has made no interactivity adjustment. Without further analysis to isolate the effective price paid for performances on Spotify's Shuffle service together with a suitable adjustment to account for functionality that goes beyond that which is permitted by the statutory license, Professor Rubinfeld provides no useful information from his Spotify benchmark for the purpose of corroborating any benchmark royalty rate.

C. Rhapsody unRadio

In paragraphs 196 to 198 of his WRT, Professor Rubinfeld claims that negotiated royalty rates for Rhapsody's "unRadio" service corroborate his proposed benchmark rates. Without any factual support, Professor Rubinfeld asserts: "In terms of functionality, it is very similar to customizable services like Pandora."[67]

Professor Rubinfeld cites rates well above the statutory rate yet makes no interactivity adjustment.[68] Professor Rubinfeld seems oblivious to the fact that his testimony is internally inconsistent. If the unRadio service really were "very similar" to Pandora, it would make no sense for Rhapsody to pay much more for the recorded music for the unRadio service than it could pay under the statutory license, a point Professor Rubinfeld himself has made repeatedly. And if it offers extra-statutory features (which it does, including unlimited skips), an adjustment would be required to use the rates for statutory licensees.

Furthermore, the number of unRadio performances [redacted] since unRadio launched in June 2014. As such a minor item in Rhapsody's much larger licensing agreement, the royalty rates paid for the unRadio service do not offer reliable information for corroborating any benchmark.

Professor Rubinfeld's discussion here provides no useful information for the purpose of setting the statutory rate.

D. Nokia MixRadio

In paragraphs 199 to 201 of his Rebuttal Testimony, Professor Rubinfeld describes MixRadio as a "near-DMCA compliant" service, "except that it permits users to play cached radio stations via Nokia devices while offline."[69] He concludes that this service is comparable to Pandora and

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[67] The Billboard article that Professor Rubinfeld cites for evidence of similarity between unRadio and Pandora One states that "... unRadio, which was created from direct licensing agreements with labels, offers additional features on top of what Pandora One currently offers." Yinka Adegoke, "Rhapsody Wants You To Pay for Radio," June 18, 2014, http://www.billboard.com/biz/articles/news/digital-and-mobile/6121651/rhapsody-unradio-t-mobile-pay-for-radio.

[68] Rubinfeld Deposition Testimony, p. 767.

[69] Rubinfeld Rebuttal Testimony, ¶ 199.

other statutory services and that the per-play royalty rates negotiated for the free MixRadio in direct licenses corroborate his benchmark proposal.[70]

Yet again, Professor Rubinfeld's testimony is internally inconsistent. If he is correct that the Nokia MixRadio service is a "near-DMCA compliant service," it would make no sense for Nokia [redacted].

Professor Rubinfeld makes no attempt to adjust Nokia MixRadio royalty rates for the additional functionality that the service offers.[71] My understanding is that this additional functionality includes, [redacted]

Professor Rubinfeld's discussion here provides no useful information for the purpose of setting the statutory rate.

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[70] Rubinfeld Rebuttal Testimony, ¶ 201, and Rubinfeld Deposition, pp. 797-798.

[71] Rubinfeld Deposition Testimony, p. 795.

[72] Stuart Dredge. "Nokia Music rebrands as MixRadio with Play Me channel," November 21, 2013. http://musically.com/2013/11/21/nokia-music-rebrands-as-mixradio-with-play-me-channel.

[73] Rubinfeld says the MixRadio premium service offers unlimited offline mixes, which would seem to allow unlimited cached stations. Rubinfeld Rebuttal Testimony, ¶. 199.

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
THE LIBRARY OF CONGRESS
Washington, D.C.

In re	)	
DETERMINATION OF ROYALTY RATES AND TERMS FOR EPHEMERAL RECORDING AND DIGITAL PERFORMANCE OF SOUND RECORDINGS (*WEB IV*)	)	**Docket No. 14-CRB-0001-WR (2016-2020)**

DECLARATION OF CARL SHAPIRO

I, Carl Shapiro, declare under penalty of perjury that the statements contained in my Amended Written Rebuttal Testimony in the above-captioned proceeding are true and correct to the best of my knowledge, information, and belief. Executed this 21ST day of April 2015 in Oakland, California.

Carl Shapiro

Appendix A: Documents Considered

CRB Hearing Documents
Web IV, Written Direct Testimony of Carl Shapiro.
Web IV, Written Rebuttal Testimony of Carl Shapiro.
Web IV, Corrected Direct Testimony of Daniel L. Rubinfeld.
Web IV, Corrected Written Rebuttal Testimony of Daniel L. Rubinfeld.
Web IV, Deposition of Daniel L. Rubinfeld.
Web IV, Written Rebuttal Testimony of Eric L. Talley.
Web IV, Deposition of Ronald C. Wilcox.
Web IV, Deposition of Robert Wheeler.
Web IV, Direct Testimony of Ron Wilcox.
Web IV, Direct Testimony of Aaron Harrison.
Web IV, Written Rebuttal Testimony of Simon Fleming-Wood.
Web IV, SoundExchange Inc.'s Responses and Objections to the First Set of Interrogatories From the Licensee Participants.
Webcaster Information Webpages
http://en.wikipedia.org/wiki/Beats_Music
http://en.wikipedia.org/wiki/MixRadio
http://recode.net/2014/01/21/beats-music-streams-with-a-human-touch
http://www.cnet.com/products/beats-music
http://www.theverge.com/2014/1/20/5319322/beats-music-vs-spotify-dr-dre-streaming
http://www.imore.com/beats-music-iphone-ipad
http://appleinsider.com/articles/15/03/09/apple-reportedly-backs-down-in-push-to-lower-relaunched-beats-music-service-prices
https://www.beatsmusic.com/legal/paymentterms
http://readwrite.com/2013/12/11/spotify-free-shuffle-mobile-play-android-ios
http://techcrunch.com/2015/01/10/music-is-a-mobile-linchpin
https://news.spotify.com/us/2013/12/11/music-for-everyone-now-free-on-your-mobile
http://blog.zagg.com/faceoff-spotify-vs-pandora.
http://www.slate.com/blogs/future_tense/2013/12/11/spotify_shuffle_free_mobile_streaming_is_bad_news_for_pandora_good_news.html
http://digwhich.com/2014/02/13/best-free-music-streaming-services
http://www.billboard.com/biz/articles/news/digital-and-mobile/6121651/rhapsody-unradio-t-mobile-pay-for-radio
http://www.cnet.com/news/rhapsody-unradio-with-t-mobile-how-it-measures-up
http://www.pcmag.com/article2/0,2817,2358596,00.asp
http://www.techhive.com/article/2599314/rhapsody-unradio-is-no-pandora-one-killer-but-its-free-for-some.html
http://www.theguardian.com/technology/2014/jul/18/nokia-mixradio-streaming-music-ios-android
http://news.microsoft.com/2014/04/25/microsoft-officially-welcomes-the-nokia-devices-and-services-business.
http://www.theverge.com/2014/12/18/7415685/line-acquires-microsoft-nokia-mixradio
http://pocketnow.com/2013/11/26/nokia-mixradio-is-the-best
http://www.windowscentral.com/mixradio-goes-ios-and-android-windows-phone-commitment-continues
http://musically.com/2013/11/21/nokia-music-rebrands-as-mixradio-with-play-me-channel

Appendix A: Documents Considered

Bates-Numbered Documents	*Bates-Numbered Documents (cont.)*	*Bates-Numbered Documents (cont.)*
APL-CRB-000001	SNDEX0122098	SNDEX0187396
APL-CRB-000019	SNDEX0126367	SNDEX0195976
APL-CRB-000020	SNDEX0127569	SNDEX0199889
APL-CRB-000021	SNDEX0132058	SNDEX0204589
SNDEX0053581	SNDEX0132062	SNDEX0204595
SNDEX0118770	SNDEX0145102	SNDEX0204808
SNDEX0118771	SNDEX0145107	SNDEX0204811
SNDEX0118989	SNDEX0145180	SNDEX0206596
SNDEX0119012	SNDEX0146211	SNDEX0206824
SNDEX0119032	SNDEX0148983	SNDEX0210910
SNDEX0119035	SNDEX0169538	SNDEX0210940
SNDEX0119037	SNDEX0169541	SNDEX0212935
SNDEX0119056	SNDEX0170692	SNDEX0212966
SNDEX0119057	SNDEX0172005	SNDEX0213479
SNDEX0119099	SNDEX0173118	SNDEX0213605
SNDEX0119102	SNDEX0175658	SNDEX0213907
SNDEX0119103	SNDEX0177032	SNDEX0214404
SNDEX0119104	SNDEX0177063	SNDEX0214439
SNDEX0119105	SNDEX0177070	SNDEX0214455
SNDEX0119106	SNDEX0177079	SNDEX0214503
SNDEX0119107	SNDEX0177085	SNDEX0214508
SNDEX0119108	SNDEX0179845	SNDEX0214511
SNDEX0119109	SNDEX0184828	SNDEX0214533
SNDEX0119110	SNDEX0184910	SNDEX0214595
SNDEX0119111	SNDEX0185424	SNDEX0214609
SNDEX0119112	SNDEX0185425	SNDEX0214625
SNDEX0119113	SNDEX0185553	SNDEX0219385
SNDEX0119114	SNDEX0185563	SNDEX0219740
SNDEX0119115	SNDEX0185572	SNDEX0219869
SNDEX0119116	SNDEX0185613	SNDEX0239821
SNDEX0119117	SNDEX0186352	SNDEX0241482
SNDEX0119118	SNDEX0186599	SNDEX0241489
SNDEX0119119	SNDEX0186614	SNDEX0241720
SNDEX0119120	SNDEX0186628	SNDEX0242017
SNDEX0119121	SNDEX0186631	SNDEX0244050
SNDEX0119122	SNDEX0186645	SNDEX0244306
SNDEX0119123	SNDEX0186739	SNDEX0252015
SNDEX0119124	SNDEX0186755	SNDEX0252186
SNDEX0119125	SNDEX0186764	SNDEX0252721
SNDEX0119127	SNDEX0186802	SNDEX0255935
SNDEX0119128	SNDEX0187352	SNDEX0259877
SNDEX0119130	SNDEX0187390	SNDEX0259908
SNDEX0119131	SNDEX0187391	SNDEX0259913

Appendix A: Documents Considered

Bates-Numbered Documents (cont.)	*Bates-Numbered Documents (cont.)*	*Bates-Numbered Documents (cont.)*
SNDEX0259924	SNDEX0349808	SNDEX0425468
SNDEX0259939	SNDEX0350124	SNDEX0425523
SNDEX0259952	SNDEX0351439	SNDEX0425530
SNDEX0259961	SNDEX0351445	SNDEX0425533
SNDEX0259978	SNDEX0355409	SNDEX0425567
SNDEX0264436	SNDEX0355511	SNDEX0425570
SNDEX0264437	SNDEX0365431	SNDEX0425587
SNDEX0264438	SNDEX0365459	SNDEX0425604
SNDEX0264439	SNDEX0365467	SNDEX0425613
SNDEX0264441	SNDEX0365476	SNDEX0425797
SNDEX0264443	SNDEX0365479	SNDEX0425875
SNDEX0264445	SNDEX0365481	SNDEX0425912
SNDEX0264447	SNDEX0365483	SNDEX0425969
SNDEX0264448	SNDEX0365484	SNDEX0425972
SNDEX0264449	SNDEX0365496	SNDEX0425981
SNDEX0264452	SNDEX0365529	SNDEX0426015
SNDEX0264910	SNDEX0365724	SNDEX0426042
SNDEX0264912	SNDEX0365726	SNDEX0426050
SNDEX0264953	SNDEX0389665	SNDEX0426081
SNDEX0265937	SNDEX0397416	SNDEX0426095
SNDEX0303848	SNDEX0403288	SNDEX0426100
SNDEX0310170	SNDEX0405884	SNDEX0426101
SNDEX0310884	SNDEX0407261	SNDEX0426109
SNDEX0312271	SNDEX0408202	SNDEX0426129
SNDEX0316165	SNDEX0414614	SNDEX0426161
SNDEX0316166	SNDEX0414947	SNDEX0426163
SNDEX0316167	SNDEX0420574	SNDEX0434931
SNDEX0316168	SNDEX0420605	SNDEX0435432
SNDEX0316220	SNDEX0420625	SNDEX0447327
SNDEX0316221	SNDEX0420651	SNDEX0447412
SNDEX0316222	SNDEX0421079	SNDEX0449000
SNDEX0318084	SNDEX0424612	SNDEX0449044
SNDEX0318360	SNDEX0424613	SNDEX0449051
SNDEX0318361	SNDEX0424690	SNDEX0449732
SNDEX0318365	SNDEX0424727	SNDEX0452170
SNDEX0318366	SNDEX0424729	SNDEX0452416
SNDEX0318369	SNDEX0424746	SNDEX0452419
SNDEX0318382	SNDEX0424759	SNDEX0452654
SNDEX0318383	SNDEX0424797	SNDEX0452667
SNDEX0318384	SNDEX0424991	SNDEX0473232
SNDEX0318385	SNDEX0425032	SNDEX0475536
SNDEX0318386	SNDEX0425041	SNDEX0479990
SNDEX0330367	SNDEX0425057	SNDEX0480580

Appendix A: Documents Considered

Bates-Numbered Documents (cont.)	*Bates-Numbered Documents (cont.)*	
SNDEX0480995	SNDEX0481081	
SNDEX0480997	SNDEX0481083	
SNDEX0480999	SNDEX0481085	
SNDEX0481001	SNDEX0481087	
SNDEX0481003	SNDEX0481089	
SNDEX0481005	SNDEX0481091	
SNDEX0481007	SNDEX0481093	
SNDEX0481009	SNDEX0481095	
SNDEX0481011	SNDEX0481097	
SNDEX0481013	SNDEX0481099	
SNDEX0481015	SNDEX0481101	
SNDEX0481017	SNDEX0481103	
SNDEX0481019	SNDEX0481105	
SNDEX0481021	SNDEX0481107	
SNDEX0481023	SNDEX0481109	
SNDEX0481025	SNDEX0481111	
SNDEX0481027	SNDEX0481776	
SNDEX0481029	SNDEX0483716	
SNDEX0481031		
SNDEX0481033		
SNDEX0481035		
SNDEX0481037		
SNDEX0481039		
SNDEX0481041		
SNDEX0481043		
SNDEX0481045		
SNDEX0481047		
SNDEX0481049		
SNDEX0481051		
SNDEX0481053		
SNDEX0481055		
SNDEX0481057		
SNDEX0481059		
SNDEX0481061		
SNDEX0481063		
SNDEX0481065		
SNDEX0481067		
SNDEX0481069		
SNDEX0481071		
SNDEX0481073		
SNDEX0481075		
SNDEX0481077		
SNDEX0481079		

All other documents and sources cited in the Report.

PANDORA EX 21

RESTRICTED DOCUMENT

Subject to Protective Order in Docket No. 14-CRB-0001-WR
(2016-2020) (*Web IV*)

PANDORA EX 22

RESTRICTED DOCUMENT

Subject to Protective Order in Docket No. 14-CRB-0001-WR
(2016-2020) (*Web IV*)

PANDORA EX 23

RESTRICTED DOCUMENT

Subject to Protective Order in Docket No. 14-CRB-0001-WR
(2016-2020) (*Web IV*)

PANDORA EX 24

RESTRICTED DOCUMENT

Subject to Protective Order in Docket No. 14-CRB-0001-WR
(2016-2020) (*Web IV*)

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
THE LIBRARY OF CONGRESS
Washington, D.C.

In re	)	
DETERMINATION OF ROYALTY RATES AND TERMS FOR EPHEMERAL RECORDING AND DIGITAL PERFORMANCE OF SOUND RECORDINGS (*WEB IV*)	)	Docket No. 14-CRB-0001-WR

REDACTION LOG FOR THE SUPPLEMENTAL WRITTEN REBUTTAL STATEMENT OF PANDORA MEDIA, INC.

Pursuant to the requirements of the Protective Order entered by the Copyright Royalty Judges on October 10, 2014 (the "Protective Order"), Pandora Media, Inc. ("Pandora") hereby submits the following list of redactions from the Written Rebuttal Testimony of Simon Fleming-Wood and Supplemental Written Rebuttal Testimony of Carl Shapiro filed April 21, 2015, and the undersigned certify, in compliance with 37 C.F.R. § 350.4(e)(1), that the listed redacted materials meet the definition of "Restricted" contained in the Protective Order.

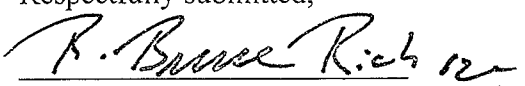
Document	Page/Paragraph/Exhibit No.	General Description
Written Rebuttal Testimony of Simon Fleming-Wood	Page 2, Paragraph 4	Contains material non-public information regarding the rates users skip songs on Pandora and information regarding listener feedback.
Supplemental Written Rebuttal Testimony of Carl Shapiro	Page 1	Contains material designated as Restricted by SoundExchange.
	Page 2 & n.4, n.6	Contains material designated as Restricted by SoundExchange.

Document	Page/Paragraph/Exhibit No.	General Description
	Page 3 & nn.8-10	Contains material designated as Restricted by SoundExchange.
	Page 4 & n.11, n.13	Contains material designated as Restricted by SoundExchange.
	Page 5 & nn.16-18	Contains material designated as Restricted by SoundExchange.
	Page 6 & nn.20-24	Contains material designated as Restricted by SoundExchange.
	Page 7, n.26	Contains material designated as Restricted by SoundExchange.
	Page 8 & n.33	Contains material designated as Restricted by SoundExchange.
	Page 9 & nn.34-25	Contains material designated as Restricted by SoundExchange.
	Page 10 & n.38, n. 40	Contains material designated as Restricted by SoundExchange.
	Page 11 & n.42	Contains material designated as Restricted by SoundExchange.
	Page 12 & nn.45-46	Contains material designated as Restricted by SoundExchange.
	Page 13 & n.48, n.51	Contains material designated as Restricted by SoundExchange.
	Page 14 & nn.54-57	Contains material designated as Restricted by SoundExchange.
	Page 15 & n.59	Contains material designated as Restricted by SoundExchange.
	Page 16, Table 1	Contains material designated as Restricted by SoundExchange.
	Page 17	Contains material designated as Restricted by SoundExchange.

Document	Page/Paragraph/Exhibit No.	General Description
	Page 18	Contains material designated as Restricted by SoundExchange.
	Page 19	Contains material designated as Restricted by SoundExchange.
	Pandora Exhibits 21-24	Contains material designated as Restricted by SoundExchange.

April 21, 2015

Respectfully submitted,



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Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
THE LIBRARY OF CONGRESS
Washington, D.C.

In re	)	
DETERMINATION OF ROYALTY RATES AND TERMS FOR EPHEMERAL RECORDING AND DIGITAL PERFORMANCE OF SOUND RECORDINGS (*WEB IV*)	)	**Docket No. 14-CRB-0001-WR**

DECLARATION AND CERTIFICATION OF TODD D. LARSON
(On behalf of Pandora Media, Inc.)

1. I am counsel for Pandora Media, Inc. ("Pandora") in the above-captioned case. I respectfully submit this declaration and certification pursuant to Rule 350.4(e)(1) of the Copyright Royalty Judges Rules and Procedures, 37 C.F.R. § 350.4(e)(1), and per the terms of the Protective Order issued October 10, 2014 ("Protective Order"). I am authorized by Pandora to submit this Declaration on its behalf.

2. I and persons under my review have reviewed Pandora's supplemental written rebuttal witness testimony, exhibits, appendix, and redaction log submitted in this proceeding. I have also reviewed the definitions and terms provided in the Protective Order. After consultation with my client, I have determined to the best of my knowledge, information and belief that portions of Pandora's supplemental written rebuttal witness testimony and exhibits contain information that is "Protected Material," as defined by the Protective Order. The Protected Material is identified in the redaction log, shaded in the printed copies of Pandora's filing, and described in more detail below.

3. The written rebuttal statement of Simon Fleming-Wood contains material non-public information regarding the rates at which users skip songs, the number of users affected by skip limits and listener feedback regarding their ability to skip songs on Pandora. If the designated information were to become public, it would place Pandora at a commercial and competitive disadvantage, unfairly advantage other parties to the detriment of Pandora, and jeopardize its business interests.

4. The supplemental written rebuttal statement of Carl Shapiro contains material non-public information containing the terms of agreements between Apple and Sony, Warner, and Universal that SoundExchange designated as Restricted. Professor Shapiro also includes information obtained from documents produced as Restricted by SoundExchange, including internal record label strategy documents and emails regarding the negotiation of the Apple deals with the Majors. Additionally, the testimony includes information from a document produced by Apple and designated as Restricted. As these documents have been designated as Restricted by SoundExchange and Apple, Pandora is bound to treat them as such under the Protective Order.

5. The contractual, commercial and financial information described in the paragraphs above and detailed on the accompanying redaction log must be treated as restricted "Protected Material" in order to prevent business and competitive harm that would result from the disclosure of such information while, at the same time, enabling Pandora to provide the Copyright Royalty Judges with the most complete record possible on which to base their determination in this proceeding.

Pursuant to 28 U.S.C. § 1746 and 37 C.F.R. § 350.4(e)(1), I hereby declare under the penalty of perjury that, to the best of my knowledge, information and belief, the foregoing is true and correct.

Dated: April 21, 2015
New York, NY

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CERTIFICATE OF SERVICE

I hereby certify that on April 21, 2015, I caused a copy of the foregoing public version of the Supplemental Rebuttal Testimony of Carl Shapiro, Written Rebuttal Testimony of Simon Fleming-Wood, Declaration and Certification of Todd D. Larson, and Redaction Log for the Supplemental Written Rebuttal Statement of Pandora Media, Inc. to be served by email and first-class mail to the participants listed below:

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